Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service; Promoting	)	
Deployment and Subscribership	)	
in Unserved and Underserved Areas,	)	
Including Tribal and Insular Areas	)	

COMMENTS OF THE COMPETITIVE UNIVERSAL SERVICE COALITION

COMPETITIVE UNIVERSAL
SERVICE COALITION

Association for Local Telecommunications Services
AT&T Wireless Services
Competitive Telecommunications Association
Dobson Communications Corporation
McLeodUSA Telecommunications Services, Inc.
Nucentrix Broadband Networks, Inc.
Personal Communications Industry Association
Smith Bagley, Inc.
Sprint PCS
U.S. Cellular Corporation
VoiceStream Wireless Corporation
Western Wireless Corporation
Wireless Communications Association

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EXECUTIVE SUMMARY

The Competitive Universal Service Coalition ("CUSC") supports the Commission's proposal to adopt rules governing state and FCC designation of eligible telecommunications carriers ("ETCs") to speed the introduction of new universal service offerings to high-cost areas by competitive entrants. The Commission would significantly advance the public interest by adopting a rule requiring that state commissions acting under Section 214(e)(2) of the Act (as well as the FCC acting under Section 214(e)(6)) complete action on petitions for ETC designation within six months or less. In addition, the Commission should put "teeth" behind the deadline by establishing a presumption that if no final order resolving an ETC petition has issued within six months, the petition will be deemed granted for federal universal service purposes. The Commission has ample legal authority to adopt such rules. Finally, the Commission should make jurisdictional determinations regarding service on tribal lands at the same time as it considers the substantive issues, so that the total time frame for FCC decisions on ETC designation is no more than a total of six months.

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COMMENTS OF THE COMPETITIVE UNIVERSAL SERVICE COALITION

The Competitive Universal Service Coalition ("CUSC"), 1/ by counsel and in response to the Further Notice of Proposed Rulemaking ("*ETC FNPRM*") in the captioned proceeding, 2/ hereby submits its initial comments regarding the establishment of procedures for the designation of eligible telecommunications carriers ("ETCs") for federal universal service support.

1/ The Competitive Universal Service Coalition includes the following companies and associations: Association for Local Telecommunications Services; AT&T Wireless Services; Competitive Telecommunications Association; Dobson Communications Corporation; McLeodUSA Telecommunications Services, Inc.; Nucentrix Broadband Networks, Inc.; Personal Communications Industry Association; Smith Bagley, Inc.; Sprint PCS; U.S. Cellular Corporation; VoiceStream Wireless Corporation; Western Wireless Corporation; and the Wireless Communications Association.

2/ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order ("*Universal Service Twelfth R&O*"), Memorandum Opinion and Order, and Further Notice of Proposed Rule-making ("*ETC FNPRM*"), FCC 00-208, ¶¶ 151-53 (rel. June 30, 2000); Public Notice, DA 00-1783 (rel. August 4, 2000) (extending filing deadline).

CUSC is eager to assist the Commission in crafting rules to facilitate the designation of competitive entrants as ETCs and to bring new services not just to tribal lands, but to rural and high-cost areas nationwide. This effort is critical to the success of the pro-competitive universal service reforms that the Commission has already undertaken pursuant to Sections 214(e) and 254 of the Communications Act of 1934, as amended ("Act"). 3/ CUSC strongly agrees with the central premise of the *ETC FNPRM*:

> [L]engthy delays in addressing requests for designation may hinder the availability of affordable telecommunications services in many high-cost areas of the Nation. [I]t is unreasonable to expect a prospective entrant to enter a high-cost market and provide service in competition with an incumbent carrier that is receiving support, without knowing whether it is eligible to receive support. If new entrants do not have the same opportunity to receive universal service support as the incumbent, such carriers may be unable to provide service and compete with the incumbent in high-cost areas. As the Commission has previously concluded, competitively neutral access to such support is critical to ensuring that all Americans, including those that live in high-cost areas, have access to affordable telecommunications services. We believe such a result to be contrary to Congress' intent in adopting section 254 of the Act. 4/

In these comments, we show that: (i) the public interest requires the Commission to adopt a rule requiring that requests for ETC designation be resolved within six months or a shorter period, both by state commissions acting under Section 214(e)(2) of the Act and by the FCC acting under Section 214(e)(6); (ii) the

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3/ 47 U.S.C. §§ 214(e), 254.

4/ *ETC FNPRM*, ¶ 151.

Commission has ample authority to adopt such rules; and (iii) an even shorter time limit should be adopted to govern jurisdictional determinations regarding service on tribal lands, so that the total time frame for FCC decisions on ETC designation is no more than six months.

I. THE COMMISSION SHOULD ADOPT RULES EXPEDITING THE PROCEDURES FOR DESIGNATING ETCs

As the Commission recognizes, ETC designation is the key that opens the door to competitive entry in high-cost and rural areas:

> A new entrant faces a substantial barrier to entry if the incumbent [LEC] is receiving universal service support that is not available to the new entrant for serving customers in high-cost areas . . . . No competitor would ever reasonably be expected to enter a high-cost market without first knowing whether it is also eligible to receive such support. 5/

One reason competitive entry has developed so slowly in rural areas in the more than four years since adoption of the Telecommunications Act of 1996 ("1996 Act") is the glacial pace of designation proceedings endured by ETC applicants in many cases. This, in turn, has had an unfortunate "chilling effect" on other competitive carriers, who have refrained from seeking ETC status.

CUSC members have sought ETC designation in a number of states (and before the FCC) with varying results. Although a few state commissions have

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5/ *Federal-State Joint Board on Universal Service; Western Wireless Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, FCC 00-248, ¶¶ 12-13 (rel. August 10, 2000) ("*ETC Declaratory Ruling*").

designated prospective entrants as ETCs, others have rejected ETC applications or have limited ETC designations to geographic areas where no funding is available. Moreover, in many other cases, the procedures for ETC designation have been delayed by up to two years. Such delays are prejudicial and economically injurious to new entrants. Furthermore, the delays function as barriers to entry, especially given that the incumbent local exchange carriers ("ILECs") received ETC designations through expedited processes that took a few short months. It is clear from the experiences of CUSC's members that federal guidance is needed to ensure expeditious, competitively neutral ETC designations throughout the states.

A. The Commission Should Require Resolution of ETC Petitions Within Six Months

The Commission should speedily adopt the proposal in the *ETC FNPRM* to require the resolution of petitions for ETC designation within six months of filing. Such a rule would go a long way toward establishing procedural certainty and unblocking the ETC designation process. It would ensure that the same non-discriminatory procedures would apply to all ETC applicants – incumbents and competitive entrants alike. 6/ CUSC applauds the Commission's own commitment to expeditiously decide the merits of ETC designation requests, 7/ and CUSC supports the proposal to codify this commitment into the Commission's rules.

6/ *See id.*, ¶ 21 & n. 39.

7/ *See Universal Service Twelfth R&O*, ¶¶ 114, 121.

CUSC also believes that a similar rule should be imposed for ETC designation proceedings before state commissions as well. Given the simplicity of the factual findings called for in Section 214(e)(1) of the Act, CUSC believes that all ETC designations should take place in the ordinary course within 90 days from the filing of the application, and that all ETC designations requiring a deeper analysis should nonetheless be complete within 180 days. This is a reasonable and manageable timeframe for any regulatory body to make ETC determinations.

Notably, some states have already adopted streamlined and expedited rules for processing and deciding ETC applications. 8/ For example, the Texas Public Utilities Commission ("PUC") has adopted rules which provide that uncontested ETC applications be processed and granted routinely within about two months, and that more controversial ETC applications be processed through an expedited hearing schedule that should be completed within approximately six to seven months. 9/ The Texas PUC is able to impose such deadlines because (i) it has committed to use the statutory criteria in Section 214(e)(2) of the Act – and no others – in deciding whether to designate carriers as ETCs, and (ii) its rules explicitly describe the contents, pleading cycle and substantive criteria applicable to all ETC applications. 10/ Similarly, the California PUC routinely grants ETC status within a few months of a

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8/ *See, e.g.*, Texas Admin. Code § 26.418 (copy attached).

9/ *Id.*, § 26.418(g)(2).

10/ *See id.*, §§ 26.418(c)-(g).

petition seeking designation. 11/ There is no reason not to require the rest of the states to follow suit.

In addition to adopting a six-month deadline for ETC designations, the Commission should put "teeth" behind that deadline by establishing a presumption that if no final order has been granted within six months after the filing of an ETC application, the application will be deemed granted by operation of the FCC's rules. The existence of such a "hard" deadline will ensure that state commissions and the FCC will act quickly, and will make it highly likely that neither the FCC nor state commissions will ever miss the deadline. Imposition of a "hard" deadline would also ensure that the FCC and state commissions curb procedures (such as extensive, abusive discovery) that slow down the process, and ensure that ETC designation proceedings move along expeditiously. 12/ CUSC respectfully submits a draft rule, which includes a process for the Commission to promptly issue public notices that would help ensure that the FCC and state commissions meet their deadlines. 13/

11/ *See, e.g., Western Wireless LLC; To Designate Western Wireless as an Eligible Telecommunications Carrier Pursuant to the Federal Communications Commission's Report and Order (97-157) in the Matter of Federal-State Joint Board on Universal Service (CC Docket No. 96-45)*, Resolution T-16436 (Cal. PSC July 20, 2000).

12/ By analogy, the FCC, to date, has never missed a statutory deadline for a rulemaking decision set by the 1996 Act, and no state has missed the statutory deadline under the Act by which, if it fails to act, the FCC assumes jurisdiction over arbitration of interconnection agreements. *See* 47 U.S.C. § 252(e)(5).

13/ *See infra* Appendix A.

B. Clarification of the Substantive ETC Criteria Would Help Expedite the Process

The Commission can further expedite the designation process by clarifying the substantive criteria for ETC status. Such resolution will aid the states in meeting the FCC's proposed six-month deadline. Designation processes in several states have bogged down as the commissions were forced – absent guidance from the FCC – to wrestle with the idea of imposing additional ETC criteria and/or with arguments by incumbents opposed to competition that such criteria are necessary, or even mandated by the Act. Authoritative FCC action is needed to lay such arguments definitively to rest. 14/

In addition, the Commission would significantly expedite the process of designating competitive entrants as ETCs by clarifying the public interest inquiry for areas served by rural telephone companies ("RTCs"). 15/ Many states are experiencing a great deal of confusion about how to carry out the public interest inquiry required for RTC study areas, which is compounding the problem of delayed

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14/ For example, the Commission should explicitly and definitively clarify that attempts to bootstrap stray concepts from Section 254 such as "affordability" or "substitutability" into Section 214(e) as criteria for ETC designation are improper. The Commission and the courts have recognized that these principles concern establishment of universal support mechanisms and are not criteria for ETC designation. *See Texas OPUC v. FCC*, 183 F.3d 393, 411 (5th Cir. 1999) (holding that Section 254(b) does not "set[ ] up specific conditions or requirements," but rather provides overarching principles for FCC and state commission universal service policies).

15/ *See* 47 U.S.C. §§ 214(e)(2), (6) (requiring a public interest finding before designating an additional ETC in an area served by an RTC).

designation of competitive ETCs. 16/ The Commission should specify that the public interest analysis must focus on *consumers* in RTC service areas and their legitimate interest in a true competitive choice for their telephone needs. Rural consumers, no less than those in lower-cost areas, are entitled to the benefits of competition, including better service at lower prices due to market pressures, the introduction of new services, and the rapid development and deployment of new technologies by both new entrants and incumbents that competition spurs. Clarifying this public interest inquiry is particularly important in the context of bringing competitive universal service to tribal lands, because they are often served in whole or in part by RTCs, so Sections 214(e)(2) and (6) will usually require that either a

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16/ For example, the Minnesota Public Utilities Commission has crafted a sensible, workable, and pro-competitive approach to the rural area public interest inquiry that the FCC would do well to adopt. *See Minnesota Cellular Corp. Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. P-5695/M-98-1285, 1999 WL 1455080, at 16 (MN PUC Oct. 27, 1999) (holding that once an ETC applicant makes an initial showing that competition will not harm consumers in RTC service areas, it is "incumbent upon the rural telephone companies to produce facts demonstrating that consumers in individual areas served by individual companies would be harmed by granting ETC status"). By contrast, North Dakota appears at a complete loss as to what the standard should be, *see Western Wireless Corporation Designated Eligible Carrier Application*, Case No. PU-1564-98-428 (ND PSC Dec. 15, 1999) (listing the public interest benefits of designating Western Wireless as an ETC in RTC service areas and the detriments that could arise from designation, then denying ETC status without providing any analysis), and other states have simply adopted a *de facto* standard that protects individual RTCs rather than the public interest. *Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier*, Docket No. 98-2216-01 (Utah PSC July 21, 2000) (denying Western Wireless federal ETC status in rate-of-return rural telephone company service areas because the effect may be "to reduce the companies' revenue, without an equal reduction in costs, [and] the State fund would be called upon to make up the difference.").

state commission or the FCC conduct an RTC-service-area public interest inquiry in order to designate ETCs for tribal areas.

Thus, following the Commission's consistent policy "to protect competition, not competitors," 17/ the Commission should hold in the context of Section 214(e), as it has elsewhere, that:

> To make a prima facie case showing economic injury contrary to the public interest, a [party opposing competitive entry] has the burden of providing specific factual data to demonstrate (1) that a competitor's market entry will cause the incumbent to incur financial loss; (2) that the incumbent would be required to curtail some or all of its services; and (3) that the public would thereupon experience a net loss of essential communications services. 18/

Consistent with this approach, the FCC should determine that an ETC applicant meets the Section 214(e) public interest standard for designation in RTC service

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17/ *Alascom, Inc., AT&T Corp. and Pacific Telecom, Inc.*, 11 FCC Rcd 732, 758 ¶ 56 (1995) (rejecting "Alaska Telecom complain[t]s about a company of AT&T's size entering the Alaska Market [based on] fears it cannot compete against AT&T") (citing *Hawaiian Telephone Co. v. FCC*, 498 F. 2d 771, 776 (D.C. Cir. 1974)); *see also Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

18/ *MCI Airsignal, Inc.*, File Nos. 22238/23662-CD-P-83, Memorandum Opinion and Order, 1986 WL 292186 (CCB 1986) (citing *WLVA, Inc. v. FCC*, 459 F.2d 1286 (D.C. Cir. 1972)). Courts have approved similar FCC approaches. *See, e.g., Western Union Int'l, Inc. v. FCC*, 804 F.2d 1280, 1289 (D.C. Cir. 1986) (affirming FCC action where "[i]ts primary concern . . . was whether the proposal before it would increase competition in a way that lowered or expanded customers' choices. Second, it looked for other ways in which the proposals might benefit the public – for example by increasing cost efficiencies or service quality, or by curbing excessive changes. Third, it balanced these possible benefits against potential detrimental effects. Fourth, it assessed the regulatory problems of implementing each proposal.") (citations omitted); *cf., MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000) (holding that the FCC was "entitled to value the free market, the benefits of which are rather well established.").

areas if it can demonstrate that (i) designation will bring specific competition-related benefits to its proposed rural service area(s); and (ii) the rural telephone company in each area fails to come forward with significant, *specific* evidence of harm *to consumers* in their service areas. This two-pronged approach will ensure that the benefits of competition will be denied for only those rural areas where such a denial is absolutely necessary to advance universal service.

These reasonable and specific measures, together with a six-month deadline for deciding ETC petitions, should ensure that ETC designations by both the FCC and the state commissions are expeditious, fair, and competitively neutral. As a result, consumers in rural and high-cost areas will more rapidly realize the benefits of competition and a strengthened system of universal service support.

II. THE COMMISSION HAS SUFFICIENT STATUTORY AUTHORITY TO ADOPT RULES FOR BOTH STATE AND FEDERAL ETC DESIGNATIONS

The FCC has statutory authority to adopt rules regarding even those sections of the Act that the states must implement, such as Section 214(e)(2)-(5), as well as its own designation of ETCs under Section 214(e)(6). Below, we provide a thorough explanation of the FCC's authority to take these actions. First, we show that, as the Supreme Court has confirmed, Section 201(b) of the Act gives the Commission clear authority to "prescribe such rules and regulations as may be

necessary in the public interest to carry out the provisions of this Act," including even those sections of the Act that the states must implement. 19/ Second, we show that Section 253 of the Act charges the Commission with ensuring that no state action – or failure to act – prohibits or has the effect of prohibiting any entity from providing telecommunications service. 20/ Finally, we show that the Fifth Circuit's decision in *Texas Office of Public Utilities Counsel v. FCC*, 21/ clears the way for the Commission to adopt rules and guidelines clarifying the ETC designation process. 22/ FCC rulemaking in this area is especially appropriate and necessary given that the Commission's universal service support mechanisms comprise a *federal* program in which the process for obtaining eligibility should be governed by a single *federal* standard that is well-specified and predictable. 23/

19/ 47 U.S.C. § 201(b); *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

20/ 47 U.S.C. § 253.

21/ 183 F.3d 393 (5th Cir. 1999) ("*Texas OPUC v. FCC*"), *cert. granted sub nom., GTE Service Corp. v. FCC*, 120 S.Ct. 2214 (2000).

22/ In addition, the rule proposed in the *ETC FNPRM* is foreshadowed by the strict procedural timelines adopted in the 1996 Act itself. Congress, apparently concerned that procedural delays could impede competition, enacted highly specific rules governing the procedures that state commissions and the FCC would have to follow in arbitrating and approving interconnection agreements. 47 U.S.C. § 252.

23/ *See* 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.").

A. The Supreme Court Has Affirmed the Commission's Authority to Adopt Rules to Implement the Market-Opening Provisions of the 1996 Act

In *AT&T v. Iowa Utilities Board*, the Supreme Court left no question about the Commission's power to adopt rules implementing the provisions of the 1996 Act, including those the states must implement. The Court's intentions could not have been plainer when it held that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'" 24/ The Court specifically rejected arguments that the limitations on the Commission's jurisdiction in 47 U.S.C. § 152(b) with regard to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" restrict the Commission's power in adopting rules to carry out the provisions of the 1996 Act. 25/ The Court recognized that "the 1996 amendments, which clearly apply to intrastate service . . . clearly confer Commission jurisdiction over some matters." 26/ As a result, the Court held that challenges to FCC power to adopt rules implementing those provisions of the 1996 Act that reform local or intrastate telecommunications "ignore[ ] the fact that §201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." 27/

24/ 525 U.S. at 378.

25/ *Id.* at 379.

26/ *Id.* (internal quotations omitted).

27/ *Id.*

The Court understood that the Act directed state commissions to implement significant aspects of the 1996 Act. Nonetheless, it recognized that, "[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to rural LECs, these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." 28/ Thus, while *AT&T v. Iowa Utilities Board* relates to the arbitration of interconnection disputes under Section 252, precisely the same rationale applies to the state commissions' responsibility to carry out ETC designations pursuant to *federal* statutory provisions that the FCC has a duty and clear authority to implement by rule.

Indeed, when addressing a challenge to the Commission's adoption of interconnection pricing rules on grounds that 47 U.S.C. § 252(c)(2) entrusts the task of establishing rates to the state commissions, the Court held that:

> The FCC's prescription, through rulemaking, of a requisite pricing methodology [does not] prevent[ ] the States from establishing rates . . . . It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates. 29/

Likewise, the FCC's prescription in this docket of requirements for ETC designation does not prevent state commissions from designating ETCs – the states will apply

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28/ *Id.* at 385.

29/ *Id.* at 384.

and implement the standards in the FCC's ETC designation rules and determine whether each carrier fulfills the ETC criteria.

If anything, the Commission's authority to adopt rules governing state commission procedures for designating ETCs for purposes of federal universal service support is even clearer in the context of this proceeding than it was in the case before the Supreme Court. The *AT&T v. Iowa Utilities Board* decision dealt with FCC prescription of federal pricing rules governing the pricing of local interconnection arrangements, which as the Supreme Court observed, are primarily intrastate matters (although matters over which the FCC had authority to adopt rules). By contrast, the ETC designation process involves eligibility to receive federal universal service support, a purely federal program. Section 214(e) establishes the criteria and means by which carriers qualify for such federal support. Even though Sections 214(e)(2)-(5) make the states responsible for certain administrative functions in qualifying ETCs for federal support, Section 201(b) permits – and Section 254(a)(2) arguably requires – that the Commission "prescribe rules and regulations . . . to carry out [these] provisions." The Commission should expeditiously exercise this power to avoid further delays in the designation of competitive ETCs.

B. The Preemptive Authority in Section 253 Supports FCC Adoption of Rules Preventing State Commissions from Impeding Entry by Delaying or Denying ETC Status

The Commission's responsibility to preempt state and local barriers to entry in Section 253 of the Act also supports a rule requiring state commissions to act on ETC designation petitions within six months, and deeming the petitions

granted in the absence of state commission action. Section 253 bars states from acting in a manner that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications service, and the Commission must preempt any state activity that violates this prohibition. 30/ The Commission has already effectively determined that state actions that unreasonably impede the designation of competitive ETCs have the effect of prohibiting new entrants from offering service in rural and high-cost areas. 31/ It is incumbent upon the Commission to take steps, as it has proposed to do, to remove that barrier to entry. The first step in the process is insisting that state commissions act within six months. The second step is effectively preempting state failures to act by treating ETC petitions that have been pending for six months as if they have been granted. Such rules are clearly within the scope and consistent with the spirit of Section 253.

Treating six-month-old ETC petitions as granted does not intrude on the state's authority under Section 214(e). As noted above, several states have already demonstrated that six months provides ample time for states to conduct the

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30/ 47 U.S.C. §§ 253(a) ("No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."); *id.*, § 253(d) ("If . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates [this section], the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.").

31/ *See ETC Declaratory Ruling,* ¶¶ 1-2, 9-31; *see also ETC FNPRM,* ¶ 151 (excerpted *supra* at 2).

proceedings necessary to designate ETCs. 32/ Since Section 214(e)(2) holds that states "shall designate" ETCs, a rule that effectively preempts their failure to carry out this duty does no more than eliminate the barrier to entry caused by the state's failure to discharge its Section 214(e)(2) responsibilities in a timely manner. Moreover, it is consistent with the Act's treatment of state commission failures to mediate, arbitrate or approve interconnection agreements in a timely manner. 33/

Consistently, the Commission recently held that state requirements that unreasonably inhibited designation of competitive entrants as ETCs effectively would constitute barriers to entry. 34/ The Commission rejected a contention that this holding unreasonably intruded upon state authority, holding that while states have "the primary authority to make ETC designations, we do not agree that this authority is without any limitation." 35/ The Commission concluded that measures that delayed or effectively precluded designation of new entrants as ETCs would not be competitively neutral, nor would they be consistent with Section 254 or necessary to preserve or advance universal service. 36/ Like the matters at issue in that case, unreasonable delays in designation of ETCs "effectively undermine[ ]

32/ *See supra* at 5-6.

33/ *See* 47 U.S.C. § 252(e)(5).

34/ *ETC Declaratory Ruling*, ¶ 10.

35/ *Id.*, ¶ 18; *see also id.*, ¶ 29.

36/ *Id.*, ¶ 20.

congressional intent in adopting the universal service provisions of section 254" and therefore must be preempted by the Commission. 37/

C. The ETC Designation Process in Section 214(e) is Ripe for Implementation Through FCC Rulemaking and Policy-Setting

The Fifth Circuit's holding in *Texas Office of Public Utility Counsel v. FCC* that Section 214(e) is ambiguous 38/ sets the stage for Commission action to implement that provision of the Act. While the Fifth Circuit reversed the FCC's statutory interpretation in the *First Report and Order* regarding whether the Act allowed state commissions to adopt additional ETC requirements, 39/ the court did not address the rules governing ETC designations adopted in that Order. 40/ Indeed, the court explicitly declined to address the extent of FCC authority to adopt rules implementing Section 214(e). 41/ Rather, finding the statute ambiguous on the matter of whether states may adopt additional ETC criteria, the court left the

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37/ *Id.*, ¶ 29.

38/ 183 F.3d at 418 ("Nothing in the statute . . . speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers.") (footnote omitted).

39/ *Id.* at 417-18.

40/ *Id.* at 419-20 (affirming FCC determination not to require ETCs to offer supported services on an unbundled basis, and otherwise not reviewing FCC rules for qualifying ETCs), *affirming in part, reversing in part, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Report and Order*").

41/ *Id.* at 417-18.

door wide open for the FCC to adopt rules governing the states' designation of ETCs pursuant to Section 214(e).

The Commission is not only empowered to adopt rules and policies implementing ambiguous provisions of the Act, its implementation of such provisions is entitled to a great degree of deference. 42/ The Fifth Circuit's decision in *Texas OPUC v. FCC* therefore not only does not disturb the FCC's authority to adopt rules for the procedures state commissions may use in considering petitions for ETC designation under the federal universal service program, the court's decision paves the way for the adoption of such a rule. The rule under discussion here is consistent with the substantive and procedural rules that the Commission has already adopted governing designation of ETCs. In the *First Report and Order*, the Commission followed the recommendations of the Joint Board and adopted Section 54.101 of the rules (governing the specific criteria that a carrier must satisfy to qualify for ETC designation); Section 54.201 (tracking the statute and directing states to follow certain additional requirements concerning ETC designation); and Sections 54.203, 54.205, and 54.207, which include additional regulations concerning ETC designations. The proposed rule at issue here is well within the scope of these existing rules, which have not been disturbed upon judicial review.

42/ *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 834 (1984).

III. THE COMMISSION SHOULD EXPEDITE ITS PROCESS FOR RESOLVING JURISDICTIONAL ISSUES FOR ETC DESIGNATIONS IN TRIBAL AREAS

The Commission should adopt its proposal to impose a time limit for the resolution of the jurisdictional issues associated with ETC designations on tribal lands. 43/ But rather than adopting a separate six month time frame for jurisdictional determinations, as suggested in the *ETC FNPRM*, the FCC should resolve *all* issues relating to ETC designations on tribal lands, including both the jurisdictional issue and the issue "on the merits," within a total of no more than six months. The Commission can easily reach this goal by consolidating its proceedings on jurisdictional and substantive issues and resolving all issues in a single order, rather than bifurcating these proceedings as adopted in the *Universal Service Twelfth R&O*. This is eminently achievable, given that any jurisdictional analysis will require that the Commission study the carrier's offering, during which time it should become readily apparent whether an ETC applicant offers the services and functionalities required of ETCs. Resolving the jurisdictional and substantive issues concurrently will expedite the introduction of new carriers and new services on Indian lands, helping promote universal service for areas of the country that need it the most.

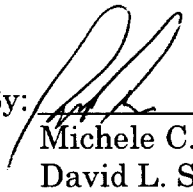
43/ *See ETC FNPRM*, ¶ 152 ("we seek comment on whether to require a similar time limit for the resolution of the jurisdictional issues associated with requests for eligibility determinations on tribal lands, and what that time limit should be").

IV. CONCLUSION

For the reasons stated above, CUSC strongly supports the proposal to require both federal and state commissions to resolve all aspects of petitions for ETC designations within no more than six months. CUSC urges the Commission to adopt such a rule expeditiously, and to put "teeth" behind this rule by establishing a default rule that, in the event a state or the FCC fails to act within the required time frame, the carrier would automatically receive federal ETC designation. The Commission has ample statutory authority to adopt such a rule.

Respectfully submitted,

COMPETITIVE UNIVERSAL SERVICE COALITION

By: 

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September 1, 2000

APPENDIX A:
PROPOSED RULE LANGUAGE

§ 54.209 Procedures for designation of eligible telecommunications carriers

(a) *Designation by state commissions.*

(1) A common carrier filing a petition for eligible telecommunications carrier status with a state commission pursuant to 47 U.S.C. § 214(e)(2) shall file a copy of such petition with the Commission.

(2) The Chief, Common Carrier Bureau, shall issue a public notice regarding the filing of such a petition within 5 days after such copy of such petition is filed with the Commission.

(3) Within 180 days of the filing of a petition for eligible telecommunications carrier status with a state commission pursuant to 47 U.S.C. § 214(e)(2), the state commission shall issue a final order either granting or denying the petition. The state commission shall transmit a copy of such order to the Office of the Secretary and to the Chief, Common Carrier Bureau.

(4) If a state commission fails to take the action specified in paragraph (a) of this section by the date 180 days after the date of filing of the petition, then the petition shall be deemed to have been granted. If a copy of such state commission order has not been received by the Commission by the date 180 days after the issuance of the public notice referred to in paragraph (a)(2) of this section, then the Chief, Common Carrier Bureau shall, by the date 185 days after the date of issuance of the public notice referred to in paragraph (a)(2) of this section, issue a further public notice stating that the petition is deemed granted.

(b) *Designation by this Commission.*

(1) Within 5 days of the filing of a petition for eligible telecommunications carrier status with the Commission pursuant to 47 U.S.C. § 214(e)(6), the Chief, Common Carrier Bureau shall issue a public notice regarding the filing of such petition.

(2) Within 180 days of the filing of a petition for eligible telecommunications carrier status with the Commission pursuant to 47 U.S.C. § 214(e)(6), the Commission or the Chief, Common Carrier Bureau, acting pursuant to authority delegated in section 0.291 of this title, shall:

(i) issue a final order establishing whether the petition is properly before the Commission; and

(ii) issue a final order either granting or denying the petition.

(3) If the Commission or the Chief, Common Carrier Bureau, fails to take the action specified in subparagraph (b)(1)(ii) of this section by the date 180 days after the date of filing of the petition, then the petition shall be deemed to have been granted.

(c) The universal service Administrator shall disburse federal universal service support to carriers whose petitions for eligible telecommunications carrier status have been deemed granted by operation of paragraphs (a)(4) or (b)(3) of this section in the same manner and in the same amount as it disburses to carriers that have received eligible telecommunications carrier designation by order of a state commission or the Commission.

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter P. TEXAS UNIVERSAL SERVICE FUND.

§26.418. Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds.

(a) **Purpose.** This section provides the requirements for the commission to designate common carriers as eligible telecommunications carriers (ETCs) to receive support from the federal universal service fund (FUSF). Only common carriers designated by the commission pursuant to 47 United States Code §214(e) (relating to Provision of Universal Service) as eligible for federal universal service support may qualify to receive universal service support under the FUSF.

(b) **Service areas.** The commission may designate eligible telecommunications carrier service areas according to the following criteria.

(1) **Non-rural service area.** To be eligible to receive federal universal service support in non-rural areas, a carrier must provide federally supported services pursuant to 47 Code of Federal Regulations §54.101 (relating to Supported Services for Rural, Insular, and High Cost Areas) throughout the area for which the carrier seeks to be designated an eligible telecommunications carrier.

(2) **Rural service area.** In the case of areas served by a rural telephone company, as defined in §26.404 of this title (relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan), a carrier must provide federally supported services pursuant to 47 Code of Federal Regulations §54.101 throughout the study area of the rural telephone company in order to be eligible to receive federal universal service support.

(c) **Criteria for determination of eligible telecommunications carriers.** A common carrier shall be designated as eligible to receive federal universal service support if it:

(1) offers the services that are supported by the federal universal service support mechanisms under 47 Code of Federal Regulations §54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services; and

(2) advertises the availability of and charges for such services using media of general distribution.

(d) **Criteria for determination of receipt of federal universal service support.** In order to receive federal universal service support, a common carrier must:

(1) meet the requirements of subsection (c) of this section;

(2) offer Lifeline Service to qualifying low-income consumers in compliance with 47 Code of Federal Regulations Part 54, Subpart E (relating to Universal Service Support for Low-Income Consumers); and

(3) offer toll limitation services in accordance with 47 Code of Federal Regulations §54.400 (relating to Terms and Definitions) and §54.401 (relating to Lifeline Defined).

(e) **Designation of more than one eligible telecommunications carrier.**

(1) **Non-rural service areas.** In areas not served by rural telephone companies, as defined in §26.404 of this title, the commission shall designate, upon application, more than one eligible telecommunications carrier in a service area so long as each additional carrier meets the requirements of subsection (b)(1) of this section and subsection (c) of this section.

(2) **Rural service areas.** In areas served by rural telephone companies, as defined in §26.404 of this title, the commission may designate as an eligible telecommunications carrier a carrier that meets the requirements of subsection (b)(2) of this section and subsection (c) of this section if the commission finds that the designation is in the public interest.

(f) **Proceedings to designate eligible telecommunications carriers.**

(1) At any time, a common carrier may seek commission approval to be designated an ETC for a requested service area.

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(2) In order to receive support under this section for exchanges purchased from an unaffiliated carrier, the acquiring eligible telecommunications carrier shall file an application, within 30 days after the date of the purchase, to amend its eligible telecommunications carrier service area to include those geographic areas that are eligible for support.

(3) If an eligible telecommunications carrier receiving support under this section sells an exchange to an unaffiliated carrier, it shall file an application, within 30 days after the date of the sale, to amend its eligible telecommunications carrier designation to exclude from its designated service area those exchanges for which it was receiving support.

(g) **Application requirements and commission processing of applications.**

(1) **Requirements for notice and contents of application.**

(A) Notice of application. Notice shall be published in the *Texas Register*. The presiding officer may require additional notice. Unless otherwise required by the presiding officer or by law, the notice shall include at a minimum a description of the service area for which the applicant seeks eligibility, the proposed effective date of the designation, and the following statement: "Persons who wish to comment on this application should notify the Public Utility Commission of Texas by (specified date, ten days before the proposed effective date). Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136, or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477."

(B) Contents of application for each common carrier seeking eligible telecommunications carrier designation. A common carrier that seeks to be designated as an eligible telecommunications carrier shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission's Regulatory Division and one copy shall be delivered to the Office of Public Utility Counsel. The application shall:

(i) show that the applicant offers each of the services that are supported by the FUSF support mechanisms under 47 United States Code §254(c) (relating to Universal Service) either using its own facilities or a combination of its own facilities and resale of another carrier's services throughout the service area for which it seeks designation as an eligible telecommunications carrier;

(ii) show that the applicant assumes the obligation to offer each of the services that are supported by the FUSF support mechanisms under 47 United States Code §254(c) to any consumer in the service area for which it seeks designation as an eligible telecommunications carrier;

(iii) show that the applicant advertises the availability of, and charges for, such services using media of general distribution;

(iv) show the service area in which the applicant seeks designation as an eligible telecommunications carrier;

(v) contain a statement detailing the method and content of the notice the applicant has provided or intends to provide to the public regarding the application and a brief statement explaining why the proposed notice is reasonable and in compliance with applicable law;

(vi) contain a copy of the text of the notice;

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(vii) contain the proposed effective date of the designation; and

(viii) contain any other information which the applicant wants considered in connection with the commission's review of its application.

(C) Contents of application for each common carrier seeking eligible telecommunications carrier designation and receipt of federal universal service support. A common carrier that seeks to be designated as an eligible telecommunications carrier and receive federal universal service support shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission staff and one copy shall be delivered to the Office of Public Utility Counsel. The application shall:

(i) comply with the requirements of subparagraph (B) of this paragraph;

(ii) show that the applicant offers Lifeline Service to qualifying low-income consumers in compliance with 47 Code of Federal Regulations Part 54, Subpart E; and

(iii) show that the applicant offers toll limitation services in accordance with 47 Code of Federal Regulations §54.400 and §54.401.

(2) **Commission processing of application.**

(A) Administrative review. An application considered under this section may be reviewed administratively unless the presiding officer, for good cause, determines at any point during the review that the application should be docketed.

(i) The effective date shall be no earlier than 30 days after the filing date of the application or 30 days after notice is completed, whichever is later.

(ii) The application shall be examined for sufficiency. If the presiding officer concludes that material deficiencies exist in the application, the applicant shall be notified within ten working days of the filing date of the specific deficiency in its application. The earliest possible effective date of the application shall be no less than 30 days after the filing of a sufficient application with substantially complete information as required by the presiding officer. Thereafter, any deadlines shall be determined from the 30th day after the filing of the sufficient application and information or from the effective date if the presiding officer extends that date.

(iii) While the application is being administratively reviewed, the commission staff and the staff of the Office of Public Utility Counsel may submit requests for information to the telecommunications carrier. Three copies of all answers to such requests for information shall be provided to the commission staff and the Office of Public Utility Counsel within ten days after receipt of the request by the telecommunications carrier.

(iv) No later than 20 days after the filing date of the application or the completion of notice, whichever is later, interested persons may provide the commission staff with written comments or recommendations concerning the application. The commission staff shall and the Office of Public Utility Counsel may file with the presiding officer written comments or recommendations regarding the application.

(v) No later than 35 days after the proposed effective date of the application, the presiding officer shall issue an order approving, denying, or docketing the application.

§26.418(g)(2) continued

(B) Approval or denial of application.

(i) An application filed pursuant to paragraph (1)(B) of this subsection shall be approved by the presiding officer if the application meets the following requirements:

(I) the provision of service constitutes the services that are supported by the FUSF support mechanisms under 47 United States Code §254(c);

(II) the applicant will provide service using either its own facilities or a combination of its own facilities and resale of another carrier's services;

(III) the applicant advertises the availability of, and charges for, such services using media of general distribution;

(IV) notice was provided as required by this section;

(V) the applicant satisfies the requirements contained in subsection (b) of this section; and

(VI) if, in areas served by a rural telephone company, the eligible telecommunications carrier designation is consistent with the public interest.

(ii) An application filed pursuant to paragraph (1)(C) of this subsection shall be approved by the presiding officer if the application meets the following requirements:

(I) the applicant has satisfied the requirements set forth in clause (i) of this subparagraph;

(II) the applicant offers Lifeline Service to qualifying low-income consumers in compliance with 47 Code of Federal Regulations Part 54, Subpart E; and

(III) the applicant offers toll limitation services in accordance with 47 Code of Federal Regulations §54.400 and §54.401.

(C) Docketing. If, based on the administrative review, the presiding officer determines that one or more of the requirements have not been met, the presiding officer shall docket the application.

(D) Review of the application after docketing. If the application is docketed, the effective date of the application shall be automatically suspended to a date 120 days after the applicant has filed all of its direct testimony and exhibits, or 155 days after the proposed effective date, whichever is later. Three copies of all answers to requests for information shall be filed with the commission within ten days after receipt of the request. Affected persons may move to intervene in the docket, and a hearing on the merits shall be scheduled. A hearing on the merits shall be limited to issues of eligibility. The application shall be processed in accordance with the commission's rules applicable to docketed cases.

(E) Waiver. In the event that an otherwise eligible telecommunications carrier requests additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll limitation, the commission may grant a waiver of these service requirements upon a finding that exceptional circumstances prevent the carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period for the waiver shall not extend beyond the time that the commission deems necessary for that carrier to complete network upgrades to provide single-party service, access to enhanced 911 service, or toll limitation services.

(h) **Designation of eligible telecommunications carrier for unserved areas.** If no common carrier will provide the services that are supported by federal universal service support mechanisms under 47 United States Code §254(c) to an unserved community or any portion thereof that requests such service, the commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.

(i) **Relinquishment of eligible telecommunications carrier designation.** A common carrier may seek to relinquish its eligible telecommunications carrier designation.

(1) **Area served by more than one eligible telecommunications carrier.** The commission shall permit a common carrier to relinquish its designation as an eligible telecommunications carrier in any area served by more than one eligible telecommunications carrier upon:

(A) written notification not less than 90 days prior to the proposed effective date that the common carrier seeks to relinquish its designation as an eligible telecommunications carrier;

(B) determination by the commission that the remaining eligible telecommunications carrier or carriers can offer federally supported services to the relinquishing carrier's customers; and

(C) determination by the commission that sufficient notice of relinquishment has been provided to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier or carriers.

(2) **Area where the common carrier is the sole eligible telecommunications carrier.** In areas where the common carrier is the only eligible telecommunications carrier, the commission may permit it to relinquish its eligible telecommunications carrier designation upon:

(A) written notification not less than 90 days prior to the proposed effective date that the common carrier seeks to relinquish its designation as an eligible telecommunications carrier; and

(B) commission designation of a new eligible telecommunications carrier for the service area or areas.